

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-2223

B P/S

United States Court of Appeals

For the Second Circuit.

NORMAN B. OPPENHEIMER, AS CUSTODIAN FOR
BARBARA ANN OPPENHEIMER, NANCY ELLEN
OPPENHEIMER, BARBARA ANN OPPENHEIMER now
known as BARBARA ANN TURNER, INDIVIDUALLY,
NANCY ELLEN OPPENHEIMER, INDIVIDUALLY, and
EVELYN OPPENHEIMER, INDIVIDUALLY,

Plaintiffs-Appellants,

-VS.-

HAROLD BERNSTEIN, RAYMOND BERNSTEIN, JOSEPH
SCHACTER, MORTIMER TOVER, INDIVIDUALLY, and as
President of Hancock Securities Corporation, a New York
Corporation, GLADYS TOVER, INDIVIDUALLY, and as
Secretary, Treasurer and Director of Hancock Securities
Corporation, a New York Corporation, and HANCOCK
SECURITIES CORPORATION, A NEW YORK
CORPORATION,

Defendants-Appellees.

*On Appeal From The United States District Court
For the Southern District of New York*

Appellant's Brief

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STATEMENT

1. The United States Court of Appeals For the Second Circuit Index Number is 74-2223. The Index Number of the Court below is 73 civ. 969 (CMM).

2. The full names of the parties remaining in this action are Norman B. Oppenheimer, as custodian for Barbara Ann Oppenheimer, Nancy Ellen Oppenheimer, Plaintiff; Barbara Ann Oppenheimer now known as Barbara Ann Turner, Individually, Plaintiff; Nancy Ellen Oppenheimer, Individually, Plaintiff; and Evelyn Oppenheimer, Individually, Plaintiff; Hancock Securities Corporation, a New York Corporation, Defendant; Mortimer, Individually, and as President of Hancock Securities Corporation, a New York Corporation, Defendant; and Gladys Tover, Individually, and as Secretary, Treasurer and Director of Hancock Securities Corporation, a New York Corporation, Defendant.

3. This action was commenced in the United States District Court For The Southern District Of New York.

4. The summons and complaint were served on Hancock Securities Corporation ("Hancock"), Mortimer Tover and Gladys Tover on March 17, 1973. There has been no appearance on behalf of Hancock and Mortimer Tover appeared pro se

for himself and Gladys Tover. Trial as between the plaintiffs and Mortimer Tover and Gladys Tover has been deferred pending the outcome of this appeal and a determination whether the United States District Court has jurisdiction in this matter.

5. This action was commenced pro se by Norman B. Oppenheimer on behalf of himself and the other plaintiffs named in this lawsuit.

6. The verified complaint (page 3, appellants appendix) alleges a cause of action for violations of Title 15 United States Code, Sections 77q(a) and 78j(b).

7. Plaintiffs moved for summary judgment on May 22, 1974 as to Hancock, this motion was granted on May 22, 1974, and referred to Magistrate Charles J. Hartenstine, (page 9).

8. An inquest was held on June 25, 1974, a Magistrate report was rendered on July 2, 1974 (page 12).

9. On August 9, 1974, the Honorable Charles M. Metzner, USEJ, based on the report of Magistrate Hartenstine of July 2, 1974, vacated the judgment of default and dismissed the complaint as to Hancock (page 20) for lack of jurisdiction of the Court.

10. This is the order appealed from.

BRIEF OF PLAINTIFFS-APPELLANTS

QUESTIONS PRESENTED

On the Appeal

1. Their is only one question presented in this appeal, on the facts alleged in the complaint and the preliminary evidence presented, Does the Court have jurisdiction of the matter ?

STATEMENT OF THE CASE

It is conceded for the purposes of this appeal, that there is no diversity of citizenship since all of the parties, both plaintiffs-appellants and defendants, were and are residents of the State of New York.

The initial securities transactions which gave rise to appellants claimfor damages involved \$22,500. The defendant Hancock, as alleged in paragraph II of the complaint (page 3), was a "dealer in securities, registered with the SECURITIES AND EXCHANGE COMMISSION ("SEC") as a member of the NATIONAL ASSOCIATION OF SECURITIES, INC., ("NASD"), of the remaining defendants, Mortimer Tover, as alleged in paragraph II of the complaint, was president and director of Hancock and Gladys Tover was secretary, treasurer and director of Hancock.

As alleged in paragraph VII (page 4) of the complaint, Hancock purchased from appellants"5000 shares of the capital stock of Micronetic Corporation, a Delaware Corporation, at a net aggregate

price to plaintiffs of \$22,500."

As further alleged in the complaint, paragraph IX (page 5), "plaintiffs made timely delivery of certificates reflecting the shares purchased by Hancock."

The entire securities transactions as set forth in detail by acknowledgement of the purchases, settlement date and confirmations, exhibits on pages 23 thru 27. These were presented by appellants at inquest for damages before Magistrate Hartenstine.

The balance of the complaint alleges, that Hancock and its officers (the two remaining defendants Mortimer Tover and Gladys Tover), entered into a scheme in violation of the securities laws, to divest Hancock of all of its assets, to subordinated lenders and to its officers, directors of Hancock and the attorneys for Hancock, to prevent a recovery by the appellants herein and other creditors of monies due them.

The complaint alleges, that these transactions in violation of the securities laws of the United States, has caused appellants damage, far in excess of the value of the securities and that their remedies are within the exclusive jurisdiction of this Court.

It is further noted, that the action having commenced March 5, 1973 in connection with the securities transactions of January 9, 1968, might well be precluded in any other forum at this time if this Court were to uphold the Court below in its decision.

POINT I

THE UNITED STATES DISTRICT COURT HAS ORIGINAL, AND EXCLUSIVE JURISDICTION OF ALL VIOLATIONS OF THE SECURITIES EXCHANGE ACT OF 1934 AND HAS AT LEAST CONCURRENT JURISDICTION OF ALL VIOLATIONS OF THE SECURITIES ACT OF 1933 .

THE COURT HAS EXCLUSIVE JURISDICTION OF ANY ACTIONS INVOLVING BROKER-DEALERS REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION AND ANY PERSON ACTING ON THEIR BEHALF IN ALL TRANSACTIONS IRRESPECTIVE OF THE USE OF MAILS AND INTERSTATE COMMERCE.

Under the Securities Exchange Act of 1934, the appellants have exclusive remedy under the Federal courts with respect to the anti-fraud provisions and if the defendant Hancock, by its officers, the other two remaining defendants in this action, illegally and in violation of both the 1933 Act and 1934 Exchange Act, divested the corporation of assets in fraud of creditors and in violation of the Acts, appellants have no remedy, except in the Federal courts which by statute is reserved exclusively to the Federal jurisdiction.

The United States Supreme Court in McKy v. Hochfelder, U.S. Sup. Ct., Dkt. 72-235 held:

A brokerage firm whose president defrauded investors by means of a spurious 'escrow' scheme, is liable to the investors for their losses under Rule 10b-5 and Section 20(a) of the Exchange Act, Rule 27 of the National Association of Securities Dealers, Inc., and common law agency principles. Liability under the Exchange Act and the NASD rules stems from the firm's failure to maintain

and enforce a system of internal supervision over its mailing and billing procedures. Since the inadequate supervision facilitated and prolonged the fraudulent scheme, the court found the firm liable as an aider and abettor to violations of Rule 10b-5 and as a controlling person who failed to act in good faith under Sec. 20(a) of the Exchange Act. The lack of precautionary measures was also in violation of the firm's supervisory obligation under Rule 27 of NASD. Moreover the firm, having clothed its president with apparent authority, was liable as principal for the fraudulent acts of its agent."

In *Entel v. Allen*, 270 F. Supp. 60 (1967) page 70, Judge Bonsal held;

"If an undisclosed scheme to breach State contract law is encompassed by Section 10(b) and Rule 10b-5, then an undisclosed scheme to breach State corporate fiduciary law must also be covered. Although the SEC's argument for this interpretation of Section 10(b) and Rule 10b-5 was rejected in *O'Neill*, it appears to have been adopted in *Brod*."

Watson v. Roberts, Scott & Co., Inc., CA-9 #93,608, Federal Securities Law Reports Number 441 dated September 13, 1972, published by Commerce Clearing House, Inc.;

"A state court decision in a contract action did not collaterally estop a federal action between the same parties determining whether a broker used a deceptive device as prohibited by Sec. 15(c) (1) of the Exchange Act. The state action ruled on the existence of a contract and dealt with no issues of fact or law which would have been dispositive of the federal action."

See also *Birnbaum v. Newport Steel Company*, 193 F. 2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952).

Section 27 of the Securities Exchange Act of 1934 (U.S. Code, title 15, paragraph 78aa) provides:

"The district courts of the United States, The United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts."

Section 28 (a) of the Act (U.S.C. Title 15, paragraph 78bb (a) provides in part:

"The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity;"

See also Oppen v. Hancock, 250 F Supp 668 (1966), page 673,

Judge Frankel, USDJ, Southern District of New York.

This is a case in which this very Court accepted jurisdiction on the same issue as presented here with the same defendant.

That complaint against the same broker-dealer, also involved violations of the Securities Exchange Act of 1934, Section 10(b)

(U.S. Code title 15 para. 78(j)(b))

(The plaintiff Oppenheimer in this case, is no way related to appellants Oppenheimer despite similarity of name)

See also H. R. Rep. No. 1418, 88th Cong., 2d Sess. 20, 1964 U. S.

Code Cong. & Admin. News 3013, 3032-3033

"SEA 15(b)(4), making applicable to any registered broker-dealer 'any provision (of the 1934 Act, with certain exceptions) which prohibits any act, practice or course of business'. The quoted language does not coincide exactly with major antifraud provisions like SEA 10(b) and 15(c)(1), under which Rules 10b-5 and 15c1-2 are issued. But it seems clear that Congress had the broadest intent. '(SEA 15(b)(4), would specify that any provision of the Securities Exchange Act of 1934 (with certain exceptions) that prohibits any act or conduct if the mails or any means or instrumentality of interstate commerce are used in connection therewith, shall also prohibit such act or conduct by a registered broker or dealer whether or not the mails or any means or instrumentality of interstate commerce is used.' "

POINT II

EVEN IF THE APPELLANTS HAD A REMEDY IN THE STATE COURTS WHICH HAVE A CONCURRENT JURISDICTION UNDER THE SECURITIES ACT OF 1933 FOR A BREACH OF CONTRACT, THEY HAVE NO REMEDY IN THE STATE COURTS FOR THEIR CLAIMS OF FRAUD IN VIOLATION OF BOTH THE SECURITIES EXCHANGE ACT OF 1934 AND THE SECURITIES ACT OF 1933 SINCE THESE ARE RESERVED TO THE FEDERAL COURTS.

The Court below apparently elected to treat this lawsuit as a breach of contract rather than as alleged in the complaint, a violation of the Securities Exchange Act of 1934 and a violation of statutory obligations imposed on a registered, broker-dealer, by law, in addition to the breach of contract alleged as well as a tort and an equity action in fraud.

The Court below completely ignored the fact, that the complaint, alleges, that the defendant Hancock was a dealer in securities, registered with the Securities & Exchange Commission, as a broker-dealer, and as such, jurisdiction over it, is exclusive to the Federal Courts, particularly, where the complaint alleges, violations of the Acts and seeks their remedies under the Acts and otherwise.

Had the appellants proceeded initially in the State Courts even on the theory of breach of contract, they could have gotten only a partial determination of the issue, since undoubtedly, the defendant Hancock would not have appeared or answered in that proceeding, the same as they did in this one.

Appellants would have wound up with a judgment against Hancock for breach of contract and fraud, which judgment, in any event, could not be enforced against the defunct corporation, and could return to this Court for its remedy against the corporation and

others for violation of the Securities and Exchange Act of 1934. This would mean two trials for the same cause of action where the Federal Court could dispose of the entire matter under the single default as well as determining all of the issues as to the remaining defendants.

If the allegations of the complaint are true a judgment for violation of the Securities Acts would perhaps prevent repetition on behalf of the remaining defendants from repeating this scheme again as the defendant Tover has attempted to do by creating another broker-dealer firm with a nonencumbered person fronting for him and working as a clerical employee.

CONCLUSION

The Court below should be reversed with a direction to determine the dollar amount of the damages sustained by the appellants and enter judgment, accordingly.

Respectfully Submitted,

BERNARD ULANO
Attorney for Plaintiffs-Appellants
Norman B. Oppenheimer, as custodian
for Barbara Ann Oppenheimer, Nancy
Ellen Oppenheimer, Barbara Ann Oppenheimer
now known as Barbara Ann Turner,
Individually, Nancy Ellen Oppenheimer,
Individually, and Evelyn Oppenheimer,
Individually.

STATE OF NEW YORK)

: SS:

COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 288 Richmond Avenue, Staten Island, N.Y. 10302. That on the 25 day of May, 1974 deponent served the within Brief upon Mortimer Toner

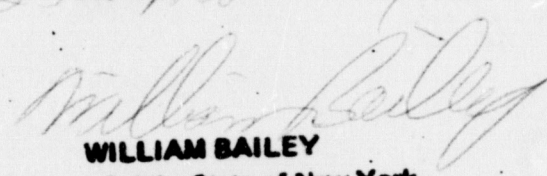
attorney(s) for

in this action, at

24 Barrington Rd.
Melville, NY 11740
the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this
25 day of May 1974


WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976